Supreme Court, U.S.
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No. 92-690

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner,

vs.

LAWRENCE J. ANGLIM,
Respondent.

Petition for a Writ of Certiorari to
The Supreme Court of Missouri

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In an action under the Federal Employers Liability Act, 45 U.S.C. §§51 *et seq.*, must there be evidence of some type relating to an appropriate discount rate, an appropriate inflation rate or method of calculating present value in order to submit the issue of the plaintiff's lost future wages to the jury?

2. In an action under the Federal Employers Liability Act, 45 U.S.C. §§ 51 *et seq.*, does the plaintiff have the burden of proving the proper measure of his damages for lost future wages by offering affirmative evidence of the present value of such damages?

LIST OF PARTIES AND RULE 29.1 LIST

The parties to the proceedings below were the Petitioner Missouri Pacific Railroad Company and Respondent Lawrence J. Anglim. Petitioner is a wholly owned subsidiary of Pacific Rail Systems, Inc., which is itself a wholly owned subsidiary of Union Pacific Corporation, a publicly owned company.

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PETITION FOR A WRIT OF CERTIORARI

The petitioner Missouri Pacific Railroad Company respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Missouri entered in this proceeding on June 30, 1992, and modified on July 21, 1992.

OPINION BELOW

The opinion of the Supreme Court of Missouri is reported at 832 S.W.2d 298. It is reprinted in the Appendix A, p. A-1.

The Circuit Court of the City of St. Louis entered judgment on a jury verdict in the amount of $2,300,000 on September 14, 1989. Pursuant to a motion of the petitioner, the Circuit Court entered an amended judgment in the amount of $2,210,239.82 on

October 12, 1989. The amended judgment is reprinted in the Appendix B, p. A-22.

JURISDICTION

The respondent brought this action in the Circuit Court of the City of St. Louis under the provisions of the Federal Employers Liability Act ("FELA"), 45 U.S.C. §§51 *et seq*.. The Circuit Court entered a judgment on a jury verdict of 9-3 in favor of respondent in the amount of $2,300,000 on September 14, 1989. Pursuant to a motion of petitioner to amend the judgment, the Circuit Court entered an amended judgment in the amount of $2,210,239.82 on October 12, 1989, setting off certain payments to respondent by petitioner pursuant to 45 U.S.C. §55. App. B at A-22.

Petitioner initially appealed to the Missouri Court of Appeals, Eastern District pursuant to Article V, § 3 of the Missouri Constitution. After the Missouri Court of Appeals affirmed the judgment, the Supreme Court of Missouri ordered the case transferred. In accordance with Article V, §10 of the Missouri Constitution and Rule 83.09 of the Missouri Rules of Civil Procedure, the Supreme Court of Missouri decided the case as on an original appeal.

On June 30, 1992, the Supreme Court of Missouri affirmed the judgment of the Circuit Court. Petitioner filed a motion for rehearing. Petitioner's motion was denied on July 21, 1992, and the Supreme Court of Missouri modified the Opinion on its own motion the same day. App. A at A-1 and App. C, p. A-23.

The jurisdiction of this Court to review the judgment of the Supreme Court of Missouri is invoked under 28 U.S.C. §1257(a).

STATUTE INVOLVED

This case arises under the Federal Employer Liability Act ("FELA"), 45 U.S.C. §51, *et. seq*. which provides in pertinent part:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier.

STATEMENT OF THE CASE

In 1984 respondent Lawrence J. Anglim was employed by the Missouri Pacific Railroad Company as a yardmaster in its Omaha, Nebraska yards. Anglim testified that while descending the steps of a locomotive, his foot slipped, he fell backwards and he hit the middle of his lower back on a part of a nearby switch. Missouri Pacific offered evidence that Anglim injured himself the night before when he got drunk and fell down the basement steps at his home.

Anglim sought medical treatment from a St. Louis doctor who performed a procedure on his back known as chemonucleolysis, in which a chemical is injected into the ruptured disk which dissolves a portion of it. The St. Louis doctor released him to go back to work in December 1984. Anglim continued to work at the railroad periodically as his physical condition permitted. Anglim's back worsened and he underwent two more operations in Omaha in 1986 and in 1988. Anglim was unable to work after September 1987.

Anglim incurred medical expenses of $25,267. In addition, he lost $132,000 in wages. At the time he stopped working, Anglim was making $3,690 per month or $44,280 per year. Anglim was thirty-nine years old at the time of trial. Assuming he would work until age sixty-five, he had an additional twenty-six years of expected working life.

At the trial, Plaintiff offered evidence of Anglim's monthly and annual wages. Tr. I-298. In addition, Anglim offered into

evidence a mortality table which established his life expectancy at 41.2 years. Tr. II-510. Neither respondent nor petitioner offered any evidence concerning a projected inflation rate, a discount rate, present value tables, expert economic testimony or any other evidence relating to or from which the jury could have calculated a present value of Anglim's lost future wages.

At petitioner's request, the Court gave an instruction on present value which read:

> If you find in favor of plaintiff and decide to make an award for any loss of earnings in the future, you must take into account the fact that the money awarded by you is being received all at one time instead of over a period of time extending into the future and that plaintiff will have the use of this money in a lump sum. You must, therefore, determine the present value or present worth of the money which you award for such future loss.

Instruction No. 8, L.F. 52.

Anglim objected to the giving of this instruction because "the defendant has not offered any evidence to support the instruction . . . [and] it simply gives the jury a roving commission." Tr. IV-459. The Court overruled the objection and the instruction was given as submitted by the petitioner. Tr. IV-459; L.F. 52. In closing argument there was only one reference to Anglim's lost future wages. Anglim's counsel, during his initial closing argument stated:

> There are some factors we know. For example, we know that Larry has incurred medical expenses in excess of $25,000. We know that his past wage loss to date is in excess of $132,000 and we know that if we projected his wage loss until retirement age 65, his wage loss would be over 1.18 [million] dollars. Those figures we know about.

But ladies and gentlemen, the instructions the court has given you, remember, you figure out the amount of damages he should be given for his pain and suffering, what he's had to date and what he will suffer with the next 41 years and you also have to consider the value of the permanent disability he has suffered and when you return to your jury room we're going to ask you to return figures which you think are fair and which we believe are fair and we will discuss those in a little bit.

* * *

Now, ladies and gentlemen, we've talked about his damages that we know about and I'm simply going to tell you that I don't think asking for another million dollars for a total of 2.3 million is too much in light of what Larry has gone through. To be quite candid with you, when you consider everything that's happened in this case, when you consider the testimony that has come in this case, 10 million wouldn't be too much. But whatever you think is reasonable. But keep in mind that he lives with this for another 40 plus years.

Tr. IV-467-468, 483.

Petitioner's trial counsel made no argument with respect to the amount of the damages. After deliberating for approximately two hours, the jury returned a 9-3 verdict in favor of the Plaintiff awarding him the full $2,300,000 requested by his counsel during closing argument. Subsequently, on motion of petitioner, the Circuit Court amended the judgment to set off payments made by or on behalf of Missouri Pacific directly to Anglim's doctors and to Anglim himself under a disability plan covering Missouri Pacific employees. An amended judgment was entered on October 12, 1989, in favor of Anglim in the sum of $2,210,239.82. App. B at A-22.

Petitioner filed post-trial motions asserting that respondent had failed to make a submissible case for lost future wages because of the lack of evidence of the present value, either by way of expert testimony, present value tables or other evidence of similar import by which the jury could have determined an appropriate discount rate. L.F. 64-67. Petitioner's post-trial motions were overruled. L.F. 159. Initially, petitioner appealed the judgment of the Circuit Court to the Missouri Court of Appeals, Eastern District. After that Court rendered an Opinion affirming the judgment of the Circuit Court, petitioner successfully sought to have the case transferred to the Supreme Court of Missouri. On June 30, 1992, the Supreme Court of Missouri entered its Opinion affirming the verdict and the amended judgment entered by the Circuit Court. Subsequently, on July 21, 1992, the Supreme Court of Missouri on its own motion modified the Opinion and denied petitioner's motion for rehearing. App. C at A-23. With regard to the present value issue, the Supreme Court adopted the opinion of the Court of Appeals with minor changes. App. A at A-10 *n.* 5.

The Supreme Court of Missouri noted that the instruction of the type given by the Circuit Court with respect to present value is mandatory in an FELA case if requested by any party. However, it rejected petitioner's contention that evidence of the manner of computing present value is an essential element of an FELA plaintiff's burden of proof. App. A at A-17. The Court recognized that the federal courts of appeals are divided over this question. App. A at A-17. It held that either party may offer present value evidence, but whether or not such evidence is offered, the subject is open to jury instruction if requested and to jury argument. App. A at A-18. The Supreme Court noted that the jury returned a general verdict and thus there was no specific finding by the jury as to what proportion of the $2,300,000 awarded was attributed to lost future wages. App. A at A-18. In deciding to follow those cases which hold that the plaintiff has

no burden of proving the present value of his lost future wages, the Court said "in the absence of any contrary indication, we can assume each juror in his or her respective fashion complied with the instruction and determined the present value of future wage loss." App. A at A-18.

REASONS FOR GRANTING THE WRIT

A writ of certiorari should issue to resolve a long-standing rift among the federal courts of appeals and among the state courts as to whether a plaintiff in a FELA action must offer some type of evidence of the present value of his lost future wages in order to make a submissible case on that aspect of his or her damages. The Second and Third Circuits have held that a plaintiff must introduce some type of evidence of the present value of his lost future wages in order for the jury to consider the issue. The state courts in Alabama, Montana and Oregon have applied a similar rule. The Fourth, Fifth, Sixth. Seventh, Eighth, and Ninth Circuits as well as the state courts in Kansas, Kentucky, Illinois, Missouri and Texas hold that the plaintiff is under no burden to present such evidence as part of his case.

The courts requiring the plaintiff to present some evidence of present value recognize that, while the concept is readily apparent to the average juror, the determination of the appropriate discount rate and the actual calculation of present value is beyond the ken of most persons in the absence of expert testimony, present value tables or similar evidence. Those courts which do not require the plaintiff to offer present value evidence rely upon the jury's common sense and general experience in financial matters based upon the assumption, as the court below said, that "each juror in his or her respective fashion complied with the [present value] instruction and determined the present value of future wage loss", App. A at A-18, despite the absence of any evidence on that essentially factual issue.

A writ of certiorari should issue to resolve the conflict as to the necessity of present value evidence in order to make a submissible case for the loss of future lost wages under federal law and to decide whether the burden of presenting such evidence falls upon the plaintiff or defendant.

A. The Court Has Not Resolved The Question Of What Constitutes Sufficient Proof Of Present Value And Which Party Bears The Burden Of Proof On That Issue

There are three broad issues which arise in every personal injury case where the plaintiff seeks the recovery of lost future wages: (1) the proper measure of damages; (2) whether and how the jury should be instructed to determine the damages; and (3) what constitutes sufficient evidence to make a submissible case and who has the burden of offering it. These questions, which directly concern the measure of damages in FELA actions, are federal in character. *Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490, 493 (1980). The first two matters were resolved by the court in *Chesapeake & Ohio Ry. Co. v. Kelly*, 241 U.S. 485 (1916). The third is the subject of this Petition.

In *Kelly*, the court reversed a judgment in favor of the plaintiff who had recovered as damages the gross amount of the earnings the employee would have earned to the end of his working life had he lived. The court held that the fundamental underlying principle of the FELA was that the damages should be compensatory only. Therefore, "when future payments or other pecuniary benefits are to be anticipated, the verdict should be made up on the basis of their present value only." 241 U.S. at 491. The jury should be instructed to reduce any award for lost future wages to their present cash value because to do otherwise would be to fail to recognize the self-evident proposition "that a given sum of money in hand is worth more than the like sum of money payable in the future." 241 U.S. at 489.

In the ensuing years the Court has re-affirmed from time to time the principle that the jury must be instructed to reduce any award for lost future wages to present value and that the present cash value of such lost future wages is the proper measure of damages. *See, e.g. Gulf Colorado & Santa Fe R. Co. v. Moser*,

275 U.S. 133 (1927). More recently, in *St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409 (1985), the court endorsed *Kelly* "as a definitive statement of the law applicable to FELA cases" establishing beyond question the principle that federal law requires a jury to award the present value of lost future wages after taking into account inflation and other sources of wage increases as well as the rate of interest and that the utter failure to give a present value instruction is reversible error. 470 U.S. at 412.

Although *Kelly* recognized that "it may be a difficult mathematical computation for the ordinary jurymen to calculate interest on deferred payments, with annual rests, and reach a present cash value," it specifically refrained from endorsing any particular rule or formula for the calculation of present value. Rather, the *Kelly* court left to the law of the forum the question of whether the present cash value of the plaintiff's lost future damages would be proved through the admission of testimony of expert witnesses, through the reception into evidence of standard interest and annuity tables in which present values are worked out at various rates of interest and for various periods, or some other method. 241 U.S. at 491.

The court has continued to refrain from endorsing any particular method although it has discussed the general outlines of how present value should be determined. In *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983), the court reversed a judgment under the Longshoremen's and Harborworkers' Compensation Act, 33 U.S.C. §904, because the court applied an irrebuttable presumption that the future rate of inflation will be equal to the future interest rate, thus precluding the application of a discount to the gross amount of wages awarded. The *Pfeifer* opinion reviewed in detail the two steps by which the trier of fact should determine the present value of the plaintiff's lost future wages. 462 U.S. 537-538.

First, the Plaintiff should offer evidence of the gross amount of his lost wages. This is normally done by simply multiplying his annual wages times his expected remaining work life. The most controversial issue which arises at this stage is whether to apply a rate of inflation to the Plaintiff's lost future wages and, if so, what rate to use. In any case where the plaintiff claims lost future wages as damages, including the case below, the plaintiff will always present evidence of the lost stream of income.

The second step, and the one which was missing in the case below, is evidence of a discount rate to be applied to the Plaintiff's lost stream of earnings in order to compute its present value. The *Pfeifer* Court reviewed a number of methods of determining the discount rate, including allowing the litigants to choose between excluding evidence of future price inflation and discounting by the "real" interest rate, or attempting to predict the effects of future price inflation on future wages and discounting by a market interest rate. *Culver v. Slater Boat Co.*, 688 F.2d 280, 308-310 (5th Cir. 1982); *O'Shea v. Riverway Towing Co.*, 677 F.2d 1194, 1200 (7th Cir. 1982). Other alternatives included a total offset method which assumes that the after-tax market interest rate on safe investments is essentially equal to future wage inflation. *See, e.g., Beaulieu v. Elliott*, 434 P.2d 665 (Alaska 1967). Still another method is to assume that the "real interest rate" (*i.e.*, the difference between market interest rates and the rate of inflation) was 2% unless the litigants proved otherwise. *Doca v. Marina Mercanti Nicaraguense, S.A.*, 634 F.2d 30, 39-40 (2d Cir. 1980). The current "real interest rate" is closer to 4%.

Finally, after making the factual findings as to the amount of the plaintiff's lost stream of income over his remaining expected work life and the appropriate discount rate to be used, the trier of fact must perform the mathematical computation of present value. This is itself a laborious process and one which few, if any, laypersons (including judges and lawyers) could accom-

plish without the assistance of a calculator or present value tables.[1]

Pfeifer held that federal law did not compel the use of any single method of calculating the appropriate discount rate. However, it did require the trier of fact to make a "deliberate choice" rather than proceeding upon an arbitrary assumption that may or may not be supported by the evidence. 462 U.S. at 552-553.

The issue of present value last came before the court in *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330 (1988). In *Monessen*, the trial court instructed the jury that a zero discount rate was to be applied as a matter of law to the plaintiff's future damages. The Court once again refused to require any particular method for discounting future damages to present value, holding that this instruction "improperly took from the jury the essentially factual question of the appropriate rate at which to discount [the plaintiff's] FELA award to present value." 486 U.S. at 342.

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[1] The formula for calculating present value is the sum of $1/(1+i)^n$ times the annual wage, where i = the effective annual yield (the discount rate) and n = the number of years. *Pfeifer*, 462 U.S. at 537 *n.* 21. In this case, for example, the plaintiff claimed lost wages of $44,280 per year for 26 years. At a discount rate of 2%, the calculation would be:

$$\$44280 \times 1/(1+.02)^1 +$$

$$\$44280 \times 1/(1+.02)^2 +$$

$$\cdots$$

$$\$44280 \times 1/(1+.02)^{26}$$

It is readily apparent that the calculation of present value involving the computation of a number up to the 26th power is not one most persons, including lay jurors, can perform with a paper and pencil. *See Plourd v. Southern Pacific Transportation Co.*, 513 P.2d 1140, 1145 (Ore. 1973).

B. There Is A Conflict Among The State And Federal Courts As To Whether Any Evidence Of Present Value Or From Which The Jury Could Compute Present Value Is Necessary To Make A Submissible Case For The Jury On The Issue Of Lost Future Wages

To say that any one of several methods of determining the appropriate discount rate and computing the present value of the plaintiff's lost future wages is appropriate does not answer the more fundamental question presented by this case: Whether a jury must be presented with *any* evidence as to an appropriate discount rate, an appropriate inflation rate, the method of calculating present value, or amount of the present value of the plaintiff's lost future wages. Nor have the Court's decisions to date directly ruled upon the question of whether the plaintiff or the defendant bears the burden of proof on this issue. *Western & Atlantic R. Co. v. Hughes*, 279 U.S. 496 (1929) (issue raised but not decided).

The lower courts have sharply divided on the question of whether a plaintiff is required to introduce evidence of an appropriate discount rate, of the method by which present value may be determined or of the present value of the claimed lost future wages. The Third Circuit has been the leading proponent of the rule that the plaintiffs must offer some evidence from which the jury could compute the present value of his lost future wages even when they are given an instruction describing to them the proper measure of damages. In *Ballantine v. Central Railroad of New Jersey*, 460 F.2d 540 (3rd Cir.) *cert. denied*, 409 U.S. 879 (1972), the plaintiff's attorney suggested in closing argument that the jury award the plaintiff his "straight line" future lost wages, *i.e.*, the amount of his annual wages multiplied by the remaining years of his work life without any reduction to present value. 460 F.2d at 542 *n.* 3. Although the jury was instructed to reduce the plaintiff's damages to present value,

there was no evidence offered which would have assisted the jury in making such a computation.

The Court concluded that the calculation of present value — as distinguished from the recognition of the principle — is generally conceded to be beyond the capabilities of most juror. 460 F.2d at 543. At best, it is a tedious and laborious task. *Cf.* C. McCormick *Law of Damages* §86, pp. 304-305 (1935) ("no jury would attempt [computing a present value] unless one of its members were an accountant."). The plaintiff offered no evidence of what interest rate could be expected from a safe investment, no evidence of any expected rate of inflation, and no guidance as to the method of computing the present value of the plaintiff's future wage loss. Accordingly, the Third Circuit granted a new trial because

> once evidence is presented and recovery is sought for future lost earnings, the jury is entitled to receive evidence and appropriate mathematical guidance on the method of reducing lost future earnings to present worth, if they are to act rationally and not upon mere 'conjecture and guess.'
>
> * * *
>
> In determining the amount of compensation the jury should not be left free to roam between confusion and conjecture.

460 F.2d at 540. *See also Gorniak v. National Railroad Passenger Corp.*, 889 F.2d 481 (3d Cir. 1989); *DiSabatino v. National Railroad Passenger Corp.*, 724 F.2d 394 (3d Cir. 1984); *DeChico v. Metro-North Commuter R.*, 758 F.2d 856, 861 (2d Cir. 1985) (court cannot rely upon jury's collective knowledge and experience to take into consideration all relevant factors relating to present value); *Resner v. Northern Pacific Ry.*, 161 Mont. 177, 505 P.2d 86 (1973) (jury may consider effect of inflation only when there is supporting evidentiary basis); *Plourd v. Southern Pacific Transportation Co.*, 513 P.2d 1140 (Ore. 1973) (jury

unable to compute present value without assistance from expert testimony or similar evidence).

More recently, in a case whose facts are substantially identical to those considered by the Court below, the Alabama Supreme Court concluded that federal law required an FELA plaintiff to offer some proof of the present worth of his lost future wages in order to make a submissible case on that issue. *Reusch v. Seaboard System Railroad*, 566 S.2d 489 (Ala. 1990), *cert. denied*, _U.S. _, 111 S. Ct. 581 (1991). In *Reusch*, the plaintiff injured his back when he tripped over some tools at work. He received the same kind of medical treatment, including chemonucleolysis performed by the same doctor who treated Mr. Anglim. The plaintiff offered evidence that he was unable to return to work and sought to recover his lost future wages for the balance of his working life.

At trial, the court instructed the jury that the plaintiff should not be awarded any damages for lost future earnings. As in the case below, the plaintiff offered evidence of his average annual salary and mortality tables, although he offered no specific evidence of his expected remaining work life. The plaintiff offered no evidence of the interest rate on the best and safest investments nor did he attempt to offer any evidence as to an application of any discount rate to his alleged stream of earnings. Moreover, the plaintiff offered no evidence of the effect of inflation on any stream of earnings that he may have had. The court held that federal law required the plaintiff to offer evidence on both steps in the calculation of present value as set forth in *Pfeifer*. Accordingly, the Alabama Supreme Court, in affirming the judgment of the trial court held:

> At most, Reusch produced only a portion of the evidence necessary to ascertain his stream of earnings. Under the applicable federal decisions, we must conclude that he did not produce the evidence necessary to sustain his claim for

> loss of future earnings. The trial court did not err by instructing the jury that it could not award Reusch damages for lost future earnings and loss of earning capacity.

566 S.2d at 492.

The decision by the Supreme Court of Missouri below stands in stark contrast not only to cases such as *Ballantine* and *Reusch*, but also to this Court's decisions in *Kelly, Pfeifer* and *Monessen*. Respondent presented evidence only of his annual earnings and a mortality table showing his life expectancy, relying upon the assumption that he would retire at age 65. There was no evidence of any inflation rate or any discount rate. The Plaintiff did not offer into evidence present value tables from which the jury could calculate the present value of his lost future wages after it had determined the amount of his lost stream of earnings and the appropriate discount rate. In short, there was simply no evidence upon which the jury could have made any calculation of present value.

This lack of evidence, however, failed to trouble the Supreme Court of Missouri. In affirming the award of damages, it held that no evidence of an interest rate, discount rate, inflation rate or, indeed, any method by which the jury could apply such rates as it might find to be applicable, need be offered. The Court recognized that there were conflicting decisions on the issue. App. A at A-17. However, the Court chose to rely upon the express assumption that "each juror in his or her respective fashion . . . determined the present value of future wage loss." App. A at A-18.

The conclusion of the Missouri Supreme Court that the Plaintiff has no burden of offering any evidence on present value other than the gross amount of his lost annual wages and perhaps his remaining life work expectancy follows similar decisions by several federal and state courts. These cases endorse the proposition that "a jury, unaided by specific testimony as to money values, could themselves, being told that the award should be

only money value, properly apply the applicable rule" in reducing the award of lost future wages to present value. *Pennsylvania R. Co. v. McKinley*, 288 F.2d 262, 265 (6th Cir. 1961). *See also Cassino v. Reichhold Chemicals, Inc.*. 817 F.2d 1338 (9th Cir. 1987); *Bonura v. Sealand Service, Inc.*, 505 F.2d 665 (5th Cir. 1975); *Heater v. Chesapeake & Ohio R. Co.*, 497 F.2d 1243 (7th Cir.) *cert. denied*, 419 U.S. 1013 (1974); *Duncan v. St. Louis San Francisco Ry. Co.*, 480 F.2d 79 (8th Cir.) *cert. denied*, 414 U.S. 859 (1973); *Brown v. Chicago & Northwestern Transp. Co.*, 162 Ill.App.3d 926, 516 N.E.2d 320 (1987); *Gannaway v. Missouri-Kansas-Texas R. Co.*, 2 Kan.App.2d 81, 575 P.2d 566 (1978); *Missouri Pacific R. Co. v. Kimbrell*, 334 S.W.2d 283 (Tex. 1960).

All of these decisions were rendered prior to *Monessen* and all but two prior to *Pfeifer*. *Cassino* ignored *Pfeifer* and *Brown* distinguished the holding that the trier of fact make a "deliberate choice" from a requirement that there be any evidence upon which to base that choice. In *Pfeifer* itself, there was no evidence presented by either party as to the proper discount rate. Rather than simply endorse the district court's findings on the issue in reliance upon the assumption that the district judge "in his or her respective fashion . . . determined the present value of future wage loss," as the Missouri court did in this case, this Court reversed and remanded *Pfeifer* for further proceedings. 462 U.S. at 552-553. In following up on this principle, *Monessen* held that the calculation of the present value of damages was "an essentially factual question" to be resolved by the jury. 486 U.S. at 342.

Having said that, it would be illogical in light of *Pfeifer* and *Monessen* to hold that a jury should determine an "essentially factual question" in the absence of any facts. For one to assume, as the Missouri Supreme Court and others do, that lay jurors are capable of making the sophisticated economic analysis or, indeed, even performing the mathematical computation of the

present value of the Plaintiff's lost wages, on any reasoned basis in the absence of any facts and any evidence of discount rates, inflation and the like is to ignore reality. *Plourd*, 513 P.2d at 1145.

Even the dissenting opinion in *Monessen* recognized that there is "no basis for turning a jury loose to speculate about the complex and technical matters that underlie any method of estimating present value." 486 U.S. at 354-355 (O'Connor, J., dissenting). The Missouri Supreme Court's assumption that each juror will "do the right thing" not only invites speculation, it invokes it as a principle of law. In commenting upon decisions which, like the court's below, suggested that the jury needed no "complicated tables" or "complex calculations," McCormick said: "This expression of attitude on the part of the court raises fundamental questions of policy on our haphazard methods of assessing compensation in actions for personal injuries." McCormick, *Law of Damages* § 86, p. 306.

The fear that requiring a plaintiff to offer evidence of the present value of his lost future wages as a prerequisite to submitting the issue to the jury will cause the trial to degenerate into a "graduate seminar" is unfounded. Juries can readily grasp the principle — what they need is information as to how to apply it. Today, juries hear evidence and decide cases involving medical and scientific issues far more complex than the concept of present value.

The Court should grant the writ to resolve the question of whether federal law requires the plaintiff to offer some evidence from which the jury can make an informed determination of the present value of his lost future wages, and thus the Plaintiff's proper measure of damages.

C. There Is A Conflict Among The Federal And State Courts As To Which Party Bears The Burden, If Any, Of Proving The Present Value Of The Plaintiff's Lost Future Wages

The Court has said that "the question of the proper measure of damages is inseparably connected with the right of action." *Kelly*, 241 U.S. at 491. Inextricably tied to the sufficiency of the evidence of a plaintiff's damages is the question of which party bears the burden of proof on the issue. Ordinarily, it would not be subject to dispute that the plaintiff has the burden of proving all of the essential elements of his claim, including the proper measure of his damages.

Our judicial system does not require the defendant to prove a material fact necessary to establish the plaintiff's cause of action. Certainly, there is no requirement that the defendant, for example, prove causation in a negligence action in the event the plaintiff did not. However, the effect of the decision below and those which endorse a similar position, is to require the defendant if it wishes to have evidence of the present value of the plaintiff's future lost wages to submit that evidence itself. This necessarily requires the defendant to prove the plaintiff's measure of damages and thus an essential element of the plaintiff's cause of action.

The allocation of the burden of proof in FELA cases is a federal question. *Central Vermont R. Co. v. White*, 238 U.S. 507, 512 (1915). The courts are divided on this issue in the same manner in which they are divided on the closely related question of whether any evidence at all must be submitted. The Third Circuit, for example, has held that the burden of proof on the question of the present value of the plaintiff's lost future wages rests with the plaintiff. Accordingly, if the plaintiff fails to offer any evidence of the present value of those losses, then he has failed to meet his burden of non-persuasion on the issue. *See*,

e.g., DiSabatino v. National R. Passenger Corp., 724 F.2d 394, 396 (3rd Cir. 1984); *Reusch*, 566 So.2d at 492. Obviously, those courts, such as the Missouri Supreme Court, which hold that no such evidence need be offered at all necessarily reach the opposite conclusion. *See, e.g., Duncan v. St. Louis San Francisco Ry. Co.*, 480 F.2d 79, 87 (8th Cir.) *cert. denied*, 414 U.S. 859 (1973).

Other courts have taken an intermediate position. For example, in *Alma v. Manufacturer's Hanover Trust*, 684 F.2d 622 (9th Cir. 1982) the Ninth Circuit held that the defendant bears the burden of proving the discount rate and the plaintiff bears the burden of proving the inflation rate. 684 F.2d at 626. The Fourth Circuit, in a series of decisions rendered just before and just after the *Monessen* case, appears to have arrived at the same conclusion. *Aldridge v. Baltimore & Ohio R. Co.*, 789 F.2d 1061 (4th Cir. 1986) (*Aldridge I*), *aff'd*, 814 F.2d 157 (4th Cir. 1987) (*en banc*) (*Aldridge II*), *rev'd*, 866 F.2d 111 (4th Cir. 1989) (*Aldridge III*).

In *Aldridge*, there was no evidence presented by the parties of either an inflation rate or a discount rate. The plaintiff told the jury to make a straight-line computation as the measure of his lost future wages, as in the case below, by multiplying the amount of his annual wages times the remaining years of his expected work life. 789 F.2d at 1066. The district court did not give a present value instruction because there was no evidence relating to the present value issue presented at trial. In *Aldridge I*, the Court decided that the allocation of the burden of proof should fall upon the party who would benefit from an acceptance of the facts by the fact finder. 789 F.2d at 1067. The concurring opinion in *Aldridge I* joined in the result only because the judge believed that the defendant had waived the point by failure to preserve it at trial. Nevertheless, the concurring opinion differed with the majority's position that the defendant had the burden of proof on the issue of the present value of the plaintiff's lost future wages. 789 F.2d at 1068.

Upon hearing the case *en banc* in *Aldridge II*, the Fourth Circuit once again affirmed the district court's decision and held that the failure to give a present value instruction was harmless error because there was no evidence offered on the present value issue. A concurring opinion by yet a different judge continued to endorse the principle of cases such as *Alma v. Manufacturer's Hanover Trust*, which like the majority in *Aldridge I*, allocated the burden of proof according to which party would benefit from the evidence. 814 F.2d at 158.

There was, however, a strong dissent in *Aldridge II* on the present value issue. Judge Chapman argued that the burden of proof or non-persuasion should fall upon the plaintiff based upon three fundamental principles: (1) the plaintiff is entitled only to his provable damages and no more; (2) the defendant is not required to produce any evidence and the burden of proving not only injury, negligence and causation, but also damages is on the plaintiff; and (3) the plaintiff's failure to offer sufficient evidence of the measure of his damages, "even in the absence of any rejoinder by the defendant, entitles the defendant to judgment." 814 F.2d at 161.[2]

The Missouri Supreme Court opted for the position that the Plaintiff has no burden of offering any evidence of the present value of his lost future wages.[3] This, in effect, treats the question

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[2] In *Aldridge I*, the Fourth Circuit panel held that it would have been "extremely confusing to the jury to ask it to make these economic adjustments without an evidentiary basis or an explanation by experts as to how such calculations are to be made." 789 F.2d at 1068. Ultimately, however, the case was remanded in *Aldridge III* for a retrial on damages, leaving open the question of whether such evidence is required.

[3] The Missouri court said the issue should simply be left to jury argument. This, if anything, may be worse. Absent the constraint of evidence upon which to base such an argument, counsel is free to tout any figure as the "present value" of the plaintiff's future wage loss even though it bears no discernable relationship to any known inflation rate, interest rate or discount rate.

of present value as if it were an affirmative defense. As a practical matter, such a rule places the defendant in a serious tactical dilemma. By not requiring the plaintiff to prove the measure of the present value of his damages, the defendant must make the Hobson's choice of either unnecessarily underscoring the plaintiff's claim for damages, thereby lending it credibility, or face a damage award which bears a substantial risk of being an inaccurate and inflated assessment of the true measure of the plaintiff's pecuniary damages.[4]

For the foregoing reasons, the Court should issue its writ of certiorari to the Supreme Court of Missouri to resolve the conflict among the lower courts as to whether the plaintiff or the defendant bears the burden of offering evidence of the present value of the plaintiff's lost future wages.

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[4] In the case below, petitioner chose to stand on the respondent's utter failure to offer any evidence of the present value of his lost future wages. The jury awarded respondent the exact amount of damages requested by his counsel in closing argument, including the gross amount of his lost future wages without reduction by any discount rate. There was, of course, no evidence from which the jury could have concluded that the inflation rate would offset the market interest rate. If the jury had applied a 2%-4% "real interest rate," the amount of lost future wages would have been reduced from $1,151,280 to $890,959 or $707,717. The windfall to the respondent (and corresponding loss to the petitioner) was $260,000 to $444,000, from 11%-19% of the total verdict.

CONCLUSION

There is a clear division of authority among the federal and state courts as to whether there must be any evidence presented to the jury on the essentially factual question of the present value of the plaintiff's lost future wages. The Missouri Supreme Court, and several federal circuit courts of appeals and state supreme courts, have held that no such evidence is necessary. These courts' position that the jurors may resolve a factual question in the absence of any facts is truly a startling departure from Anglo-American jurisprudence, not to mention from ordinary principles of federal law.

Moreover, the underlying assumption found in these decisions that the average juror is capable of determining the proper discount rate and making the necessary mathematical computation without the assistance of a calculator with a present value function, present value tables, expert testimony or other similar evidence is simply unfounded. It is one thing to have confidence in the jury system; it is quite another to endorse the speculation and conjecture inherent in the assumption that "each juror in his or her respective fashion" will arrive at the proper measure of damages.

The conflicting decisions of the Third Circuit in *Ballantine* and *DiSabatino* and the Alabama Supreme Court in *Reusch* properly require a plaintiff to offer *facts* from which the jury can find the appropriate discount rate, and a method by which the jury may use that rate, to resolve the "essentially factual question" of the present value of the Plaintiff's lost future wages. This is not merely a theoretical nicety, but a very practical problem involving large sums of money faced by litigants, attorneys and judges in state and federal trial courts throughout the nation every day.

More importantly, the FELA should be administered uniformly on questions concerning federal matters, such as the

proper measure of damages. The conflict among the courts has festered for twenty years. A writ of certiorari should issue to the Supreme Court of Missouri to resolve it once and for all.

Respectfully submitted,

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October 1992

APPENDIX

APPENDIX A

SUPREME COURT OF MISSOURI
EN BANC

No. 74124

LAWRENCE J. ANGLIM,

Respondent,

vs.

MISSOURI PACIFIC RAILROAD CO.,

Appellant.

APPEAL FROM THE CIRCUIT COURT
OF THE CITY OF ST. LOUIS

The Honorable James L. Sanders, Judge

[Filed June 30, 1992;
modified July 21, 1992]

Following a jury trial, a judgment was entered in favor of plaintiff Lawrence J. Anglim and against Missouri Pacific Railroad for injuries sustained in a slip and fall. The claim was brought under the Federal Employers Liability Act, 45 U.S.C. §§ 51-60 (1988) (FELA), and the Boiler Inspection Act, 45 U.S.C. §§ 22-34 (1988). Following opinion by the Missouri Court of Appeals, Eastern District, this Court granted transfer.

I.

The first issue, and the issue moving this Court to grant transfer, is whether the trial court abused discretion in failing to sustain defendant's motion to dismiss plaintiff's claim under the doctrine of *forum non conveniens*. The record before the trial court when the motion was ruled upon is extremely sparse, being limited to pleadings, the motion, suggestions in support of the

motion, and three affidavits. Also before the trial court were plaintiff's suggestions in opposition to the motion to dismiss.

The petition alleges that on April 6, 1984, while plaintiff was employed as a yardmaster at defendant's Omaha, Nebraska, yard, he was injured when he slipped and fell on grease, oil, and water that had accumulated on the steps and walking surfaces of a locomotive. The petition also alleges that defendant's "principal place of business" is in St. Louis, Missouri. Defendants' answer denies any liability and also denies that its principal place of business is in St. Louis. However, it admits being a "common carrier by railroad in interstate commerce in the states of Missouri, Nebraska, and other states in the United States."

One of the affidavits attached to the motion to dismiss for *forum non conveniens* was that of defendant's attorney, William Hamblin. He asserted that "[a]ll of the anticipated witnesses to be called by the parties in this matter, with the exception of Dr. Shoedinger in St. Louis, either work or reside in the Omaha, Nebraska area." The second affidavit was that of Robert G. Galley, manger of the Casualty Management Office for Missouri Pacific. He stated that the defendant railroad is registered to do business and "maintains track, offices and repair facilities" in both Missouri and Nebraska. He stated that defendant is a Delaware corporation and since December 31, 1984, has had its "headquarters" in Omaha, Nebraska. The affidavit also stated that plaintiff and all witnesses except Dr. Shoedinger reside in or around Omaha, Nebraska. Neither of the affidavits indicate precisely where the Missouri offices or facilities are located or exactly what business was done at any of those offices. More particularly, neither affidavit establishes the issue raised in the pleadings, *i.e.*, where defendant's "principal place of business" is located.

Plaintiff's counsel also filed an affidavit alleging that plaintiff was evaluated by numerous physicians and health care providers

in St. Louis, including Dr. Shoedinger who examined plaintiff less than a month after the accident and performed surgery at a St. Louis area hospital. The affidavit further asserted "upon information and belief" that Missouri Pacific does business throughout Missouri, maintaining "offices and agents for the transaction of its usual and customary business in the city of St. Louis." On this record the trial court overruled the motion to dismiss.

The doctrine of *forum non conveniens* provides that notwithstanding proper jurisdiction and venue by the letter of the statute, a trial judge has discretion to not exercise jurisdiction if the forum is seriously inconvenient for the trial of the action involved and if a more appropriate forum is available to the plaintiff. *Restatement (Second) of Conflict of Laws* § 84 (1971). The doctrine is designed to prevent a plaintiff from using a liberal venue statute to vex, oppress or harass a defendant by bringing a suit in a forum unrelated to the parties or cause of action. But a plaintiff's choice of forum is not to be disturbed except for "weighty reasons" and the case should be dismissed only if the "balance is strongly in favor" of the defendant. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508, 67 S.Ct. 839, 843 (1947); *Silversmith v. Kenosha Auto Transport*, 301 N.W.2d 725, 728 (Ia. 1981).

The first Missouri case to refer to the doctrine of *forum non conveniens* by name was *State ex rel. Southern Ry. Co. v. Mayfield*, 359 Mo. 827, 224 S.W.2d 105 (1949), *cert. granted*, 339 U.S. 98, *vacated*, 340 U.S. 1 (1950), although the doctrine was not applied there. This Court both acknowledged and applied the doctrine in *Elliott v. Johnston*, 292 S.W.2d 589 (Mo. 1956). There the plaintiff's lawyer and a cooperative, if not collusive, defendant arranged for suit to be filed and service of process to be had in Vernon County, Missouri. The claim arose out of an automobile accident that had occurred in an adjoining Kansas county. The parties and all witnesses resided in Kansas. Obviously, the substantive law of Kansas was applicable to the

case. The trial court found, *inter alia*, that the trial could take at least twelve days, would be burdensome on taxpayers, and that "the Missouri dockets and that of Vernon County are already overloaded." The trial court's decision to dismiss on the basis of the *forum non conveniens* doctrine was affirmed. 292 S.W.2d at 594-95.

The doctrine was again acknowledged in *Loftus v. Lee*, 308 S.W.2d 654 (Mo. 1958). But there this Court held that an action filed in Jackson County, Missouri, involving an auto accident that occurred in a Kansas suburb of Kansas City, Missouri, between two Kansas residents was not so unjust and oppressive as to justify application of the doctrine of *forum non conveniens*. The trial court's dismissal on that basis was reversed. 308 S.W.2d at 661.

The applicability of the doctrine to FELA cases was in doubt for a time due to constitutional concerns about denying nonresidents access to Missouri courts. *See State ex rel. Southern Ry. Co. v. Mayfield*, 340 U.S. 1, 71 S.Ct. 1 (1950); *State ex rel. Southern Ry. Co. v. Mayfield*, 362 Mo. 101, 240 S.W.2d 106 (banc 1951); *see also Loftus v. Lee*, 308 S.W.2d at 657. However, this Court subsequently held the doctrine of *forum non conveniens* applicable to a FELA action notwithstanding prior decisions to the contrary. *State ex rel. Chicago, Rock Island & Pacific R.R. Co. v. Riederer*, 454 S.W.2d 36, 38-39 (Mo. banc 1970). This Court's most recent statement of the doctrine in a FELA case is found in *Besse v. Missouri Pacific R.R. Co.*, 721 S.W.2d 740 (Mo. banc 1986), *cert. denied*, 481 U.S. 1016 (1987). Finally, this Court held that the doctrine has no intrastate application. *Willman v. McMillen*, 779 S.W.2d 583, 586 (Mo. banc 1989).

In *Riederer*, at least six factors were identified that trial courts were to use as a guide in exercising their discretion to apply the doctrine of *forum non conveniens*.

(1) place of accrual of the cause of action,

(2) location of witnesses,

(3) the residence of the parties

(4) any nexus with the place of suit,

(5) the public factor of the convenience to and burden upon the court, and

(6) the availability to plaintiff of another court with jurisdiction of the cause of action affording a forum for plaintiff's remedy.

454 S.W.2d at 39. However, neither *Riederer* nor its progeny purport to give an exclusive listing of facts to be considered in deciding whether to apply the doctrine of *forum non conveniens* or the respective weight accorded to any particular factor. Precise rules dictating when the doctrine is applicable might seem attractive. However, evidentiary permutations justifying application of the doctrine are unpredictable. The more prudent course is not "to catalogue the circumstances which will justify or require either grant or denial of remedy." *Gulf Oil Corp. v. Gilbert*, 330 U.S. at 508, 67 S.Ct. at 843. In deciding whether to dismiss, a trial court necessarily must determine facts and, in doing so, weighs evidence and assesses the credibility of witnesses as to the reasons given for selecting or opposing a particular forum. Witness intangibles and knowledge common in the community where the case is tried impact on the weight and credibility of evidence.[1] Because the application of the doctrine of *forum non conveniens* is fact intensive and the weight to be accorded any factor is dependent on the circumstances, trial court discretion is essential. Nevertheless, discretion is not the

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[1] The court of appeals opinion takes note of a "multistoried Missouri Pacific Railroad Building with offices for hundreds of defendant's employees within sight of the Circuit Court of the City of St. Louis."

equivalent of whim; discretion must be applied with control. *Besse*, 721 S.W.2d at 742.

On appeal, in determining whether the trial court's ruling amounted to an abuse of discretion, only those facts will be considered that were before the trial court when it ruled on the motion to dismiss,[2] and the evidence will be viewed in a light favorable to the result of the trial court. Also on appeal, discretionary rulings are presumed correct, and the appellant bears the burden of showing an abuse of discretion. *State ex rel. Webster v. Lehndorff Geneva*, 744 S.W.2d 801, 804 (Mo. banc 1988). Judicial discretion is abused when the trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration; if reasonable persons can differ about the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. *Id.* In the context of an appeal from an order overruling a motion to dismiss based on a claim of inconvenient forum, the decision of the trial court is not to be disturbed unless the appellate court is firmly convinced of two propositions. First, the appellate court must be convinced that the relevant factors weigh heavily in favor of applying the doctrine of *forum non conveniens*. Second, the court must be convinced that permitting the case to be tried in Missouri would lead to an injustice because such trial would be oppressive to the defendant or impose an undue burden on Missouri courts.

The factors identified first in *Riederer*, and later in *Besse*, favorable to dismissal of this case include the residence of

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[2] Certain language in *Besse* suggests that evidence offered during trial should be considered on appeal in determining if the trial court abused discretion in overruling a pre-trial motion based on *forum non conveniens*. *See Besse*, 721 S.W.2d at 743. That dicta is not supported by reason or case law and is not to be followed.

plaintiff in Nebraska, that the action accrued in Nebraska, and that most witnesses reside in Nebraska. In addition, defendant agreed to waive the statute of limitations for the period after the suit was filed in the City of St. Louis, thus giving plaintiff a forum in which to pursue his remedy.

In assessing the "location of witnesses" factor, defendant notes that seven identified witnesses were from Nebraska, while only Dr. Shoedinger was in Missouri. In *Besse*, eyewitnesses and treating physicians seem to have been placed on an equal footing in making the *forum non conveniens* analysis. 721 S.W.2d at 742. However, it is not unusual for the most critical fact issue in a personal injury suit to be the nature and extent of the plaintiff's injury, while the facts surrounding the accident that resulted in the injury may be virtually uncontested. In such cases, the need to have ready access to the treating physicians and medical records is as critical to the preparation and trial of the case as is accessibility to eyewitnesses to the accident. In addition, the cost of presenting an expert treating physician at some location distant from his or her practice may exceed the cost of transporting several eyewitnesses to Missouri. On this, as on other factual matters, the moving party has the initial burden of establishing the relative inconvenience caused by the witnesses' location and, on appeal, the aggrieved party must also show that discretion was abused. The mere fact that more witnesses are located in another state than are located in Missouri does not conclusively establish the question of witness location favorably to the defendant.

On the issues of defendant's residence and nexus to Missouri, the evidence is ambiguous, if not favorable, to plaintiff. Missouri Pacific suggests that it is not a "resident" of Missouri because its corporate headquarters is in Omaha, Nebraska. The argument is founded on a statement in *Besse* that the location of defendant's headquarters in Missouri was a "controlling circumstance" in refusing to dismiss plaintiff's case. 721 S.W.2d at 743. The

argument assumes that a corporate headquarters is necessarily the "principal place of business" of a corporation. The assumption is flawed. A corporation may be created under the laws of one state, have its headquarters in another state, and do its primary business in yet one or more other states. Nothing in the affidavits establishes the principal location of defendant's business or the primary location of defendant's Missouri operations. The record establishes that defendant has offices, employees, a registered agent, tracks, and maintenance facilities in the City of St. Louis and that it engages in all aspects of the business of a common carrier railroad in Missouri. Defendant's brief candidly admits it is a resident of St. Louis under Missouri's corporate venue statute. § *508.040*, RSMo 1986. Implicitly defendant solicits business and undertakes transportation of goods to and from Missouri shippers. Implicit also is that defendant's business is conducted by or through its facilities in the City of St. Louis, Missouri.

Other than the designation of Omaha as its headquarters, defendant has failed to show that it has so significantly limited its Missouri operations that it may not be considered as a Missouri "resident" in the context of the *Riederer* factors.[3] As stated in *Besse*, it is seldom considered inconvenient to be sued in a defendant's place of residence. 721 S.W.2d at 743. To prevail on a claim that the trial court abused discretion finding the defendant has a Missouri residence or nexus, the defendant must produce substantial evidence clearly demonstrating that the corporate business activities in Missouri are limited or that

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[3] While not precisely on point, various cases construing Missouri's venue statutes have found a corporation to be a resident of the county in which a registered agent is located or where the corporation maintained an office or agent for the transaction of its business. *State ex rel. Rothermich v. Galagher*, 816 S.W.2d 194, 198-200 (Mo. banc 1991); *State ex rel. Dick Procter Imports, Inc., v. Gaertner*, 671 S.W.2d 273, 274-75 (Mo. banc 1984) (construing § 508.010, *et seq.*, RSMo 1986).

those activities have no significant relationship to the jurisdiction in which the case is filed.

The other factor to be considered is the convenience to and burden on the court. Statistical data may be submitted to support a claim that the caseload of the trial court is so overwhelming that the case cannot be expeditiously litigated in the jurisdiction where the case is filed. Such matters as taxpayer cost, jury time, the necessity to interpret and apply the law of a foreign jurisdiction, and similar facts may be offered and weighed by the trial court. In addition, the trial court may take notice of the congestion of its own docket. In this case, the trial judge is experienced and has served as the presiding judge of his circuit. He was undoubtedly aware of the state of the docket in St. Louis when the motion was heard. The substantive law in question is federal law. The courts of this state are familiar with both the interpretation and application of the Federal Employers Liability Act. No specific evidence of any undue burden on the court was offered at the motion hearing.[4]

Under the facts of this case, the trial court may well have sustained the motion to dismiss without abusing discretion. But to reverse the trial court's ruling on appeal requires more than a showing that the motion could have been sustained. Defendant has failed to convince this Court that the factors strongly favor dismissal and that this case imposes an oppressive inconvenience on the defendant or undue burden on the circuit court of the City of St. Louis. In sum, after reviewing the record and considering all relevant factors, it cannot be said that the trial court's ruling is clearly against the logic of the circumstances and so arbitrary and unreasonable as to shock the sense of justice

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[4] The briefs of defendant and an *amicus* brief filed in this Court by other railroads contain alleged statistics and data regarding FELA claims in the City of St. Louis. The data were not before the trial court when it ruled on the motion to dismiss and will not be considered at this late date.

and indicate a lack of careful consideration. Thus, no abuse of discretion has occurred. The first point is denied.

In reaching this conclusion, this Court reiterates that the doctrine of *forum non conveniens* is available in appropriate cases and is neither abandoned nor modified. We reject the suggestion that the rule be modified so that whenever litigation is between out-of-state residents over causes of actions that arose out of state, a plaintiff must bear the burden of justifying the choice of forum. The federal statute authorizes venue in any jurisdiction "in which the defendant shall be doing business." 45 U.S.C. § 56 (1988). Because of the policy declared by that statute, the United States Supreme Court has said, "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Gulf Oil Corp. v. Gilbert,* 330 U.S. at 508, 67 S.Ct. at 843. The Supremacy Clause of article VI of the United States Constitution constrains us to apply the policy expressed by the federal venue law with no less enthusiasm than if it were our own. *Bunge Corp. v. Perryville Feed & Produce*, 685 S.W.2d 837, 839 (Mo. banc 1985). Also, our state's General Assembly has adopted an extremely liberal venue policy in regard to railroad corporations. A railroad controlling, owning, or operating facilities in two or more counties may be sued in any such county or in any county where it keeps an office or agent for the transaction of its business. § *508.040*, RSMo 1986. For these reasons, the defendant has the burden of establishing all factors supporting a claim that a Missouri court is an inconvenient forum.

II.[5]

Defendant's next point on appeal alleges trial court error in overruling its motion for a new trial based upon the failure of one

[5] The remainder of this opinion, with some minor changes, is that of the Missouri Court of Appeals, Eastern District, authored by the Honorable Carl R. Gaertner, Chief Judge.

juror to disclose her involvement in a lawsuit upon voir dire examination.

The following question was addressed to the entire venire by plaintiff's attorney:

> We talked earlier about Workmens [sic] Compensation claims. And what I'd like to do now is broaden that question a little bit. Is there anybody who's ever filed any sort of claim for personal injury other than Workmens [sic] Compensation? So if you've been in automobile accident and you were injured and you filed a claim, even if you didn't file a lawsuit, but you made the claim or you maybe slipped and fell somewhere and you filed a claim against somebody asking for compensation.
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> . . . .
>
> . . . Any type of claim. And to simplify matters and save some time, not only the members on the panel, but also members of their family, so either you, your husband, wives, children, nephews, cousins, the whole shebang.

Juror #1, Mrs. Margaret Unger, had previously answered more specific questions concerning back injuries and workers' compensation claims by members of her family. She disclosed the fact that her husband had sustained a "slipped disk" in his back twenty years ago, and that he had also made a workers' compensation claim for a knee injury. In response to the question set forth above, she informed counsel that her son had a pending claim arising out of an automobile accident. She did not mention the fact that there was then pending in United States District Court for the Eastern District of Missouri a lawsuit in which she was named as a plaintiff. She was chosen to serve on the jury and signed the verdict.

A hearing was held pertaining to this allegation in defendant's motion for new trial. It was there developed that Mrs. Unger's

husband was an asbestos worker. In 1986, a lawsuit was filed against a number of asbestos manufacturers alleging Mr. Unger had contracted asbestosis. Mrs. Unger was named as a plaintiff in a consortium count. At the hearing she testified that although she had accompanied her husband when his deposition was taken and had at that time been questioned briefly about his health, she had not been aware of the fact she was named as a plaintiff in the lawsuit. It was her understanding that the lawsuit had been filed on behalf of her husband, who had never received any medical treatment or missed any time from work because of asbestosis, in order to protect his rights if, in the future, he began to suffer from years of exposure to asbestos. In fact, after the verdict in this case but before the hearing on the motion, the federal case was dismissed upon the agreement of the defendants therein to waive any statute of limitations defense. Mrs. Unger testified that at the time she was questioned about family claims and injuries the Federal Court lawsuit never entered her mind; she "never thought of it" until defendant's attorney called her.

In its order overruling defendant's motion for new trial, the court made the following finding:

> The Court held a hearing on Defendant's portion of its motion dealing with the issue of non-disclosure by a juror. The Court heard the juror's testimony and is convinced that she is a very truthful witness. During voir dire she disclosed three events involving personal injury claims in her family. The nondisclosure complained of here involves an asbestos class action suit wherein her husband was a named Plaintiff as well as herself. She did not know she had been named as a Plaintiff. Her husband was named as a Plaintiff because he was an asbestos worker. He did not have asbestosis and was not being treated for it. The action was filed to toll the statute of limitations. The case was then dismissed with the provision that if any of those named Plaintiffs contracted asbestosis then the statute of limitations would not be raised

> as a defense in a subsequent filing. The Court is of the opinion that this was an innocent non-disclosure and there was no prejudice to the Defendant.

The trial court's conclusion that this was an "innocent non-disclosure" indicates that the trial judge believed the juror's conduct was unintentional. In addition, because Mrs. Unger had at present sustained no injury for which she anticipated recovery, her failure to respond to a question regarding any "claim" was reasonable. Where a nondisclosure is both unintentional and reasonable, the relevant inquiry is whether the juror's presence did or may have influenced the verdict so as to prejudice the party seeking a new trial. *Williams by Wilford v. Barnes Hosp.*, 736 S.W.2d 33, 37 (Mo. banc 1987).

A trial court's acceptance or rejection of the juror's explanation is not lightly overturned on appeal. The trial court's finding of a lack of prejudice is a fact finding and, as such, will be disturbed on appeal only for abuse of discretion. 736 S.W.2d at 37. Only when an appellate court is convinced from a totality of the circumstances that the right to fair trial and the integrity of the jury process has been impaired should the trial court be found to have abused discretion. *Alexander v. F. W. Woolworth Co.*, 788 S.W.2d 763, 768 (Mo. App. 1990).

We have no such conviction here. The trial court specifically found Mrs. Unger to be a truthful witness. Because of the greater ability of the trial judge to observe the juror's demeanor both during voir dire and during a post-trial explanation of her nondisclosure, we afford his determination of credibility great deference. The record lends support to the trial court's finding as Mrs. Unger's openness and candor is demonstrated by the fact that she responded to questions propounded to the entire venire more than any other prospective juror. We can perceive no reason, nor does defendant suggest any reasons, to explain why she should unhesitatingly disclose the prior claims of her hus-

band and son and conceal the asbestosis lawsuit other than what she said: "I never thought about it." The unusual nature of the Federal Court action, filed to protect against future developments before any medical treatment or loss of work had taken place, renders this forgetfulness understandable. Mrs. Unger was a former employee of a railroad as had been her father-in-law, facts disclosed on voir dire, and bore no animosity toward this defendant or any railroad. The record amply supports the trial court's finding of an innocent non-disclosure causing no prejudice to defendant.

III.

Over plaintiff's objection defendant presented the testimony of Professor Gary Herrin, an expert in ergonomics, the study of work. The gist of Professor Herrin's testimony is stated in defendant's brief as follows:

> The import of his testimony was that the locomotive's steps would not have been significantly more slippery with oil on them than if they were dry and [plaintiff] should not have slipped on the steps even if they were oily . . . [and] if [plaintiff] had slipped on the steps in the manner he described he would have fallen *towards* the locomotive instead of *away* from it.

In advance of the testimony, plaintiff's counsel objected that the proposed evidence was not a proper subject of expert testimony because it concerned a matter of common knowledge and because of the lack of foundation in that the tests the professor conducted did not reproduce similar circumstances to those existing at the time of plaintiff's fall. Although expressing some reservation, the trial court overruled the objection and permitted the testimony.

The witness testified concerning tests he made to determine the coefficient of friction between an oily locomotive step and

work shoes. He did not know the type work shoes worn by plaintiff, but used what he was told by a shoe repair man were common types of soles on work boots, the only two types the repair man had in stock. He did not know the exact nature of the substance on the steps when plaintiff fell but used medium weight shop lubricating oil in his test. However, based upon assumptions drawn from plaintiff's deposition, he developed a computerized simulation of a three-dimensional bio-mechanical model and simulated twenty-four different postures, that is, varying angles of a foot upon the steps and positions of hands upon the railings, and concluded that:

> So there's force that's acting on foot and force that's acting on each of the hands. And so in no case did we observe hand forces that exceeded peoples grip. Doesn't have the capability based on population studies. And with one exception — two exceptions maybe we could, wouldn't simulate a slipping type of conditions with the stair and the foot.

Based upon the same assumptions and tests, the witness also concluded that plaintiff would have fallen forward rather than backward as he claimed. At the conclusion of all the evidence plaintiff offered the following withdrawal instruction:

> The evidence of Professor Gary Herrin is withdrawn from the case and you are not to consider such evidence in arriving at your verdict.

Because the expert testimony was based upon the assumption of facts not in evidence and upon tests that did not duplicate the conditions existing at the time, particularly the nature and extent of the oil and grease and the type and condition of the soles of plaintiff's boots, the trial court gave the withdrawal instruction. We find no error.

Exclusion of testimony and giving withdrawal instructions are both matters within the discretion of the trial court. *Kelly v.*

Jackson, 798 S.W.2d 699, 704 (Mo. banc 1990); *Dunn v. St. Louis-San Francisco Ry. Co., 621 S.W.*2d 245, 252 (Mo. banc 1981). Experimental evidence is admissible only if the experiment is made under substantially similar conditions to those at the time of the accident, although the conditions need not be identical. *Blevins v. Cushman Motors,* 551 S.W.2d 602, 610 (Mo. banc 1977). That no such substantial similarity was shown between the material facts pertaining to plaintiff's slip and fall and the computer test on which Professor Herrin based his opinion is obvious. The trial court did not err in giving the withdrawal instruction.

IV.

Plaintiff introduced evidence concerning the loss of future wages as a result of his injury. No evidence was introduced regarding the present value of the total of wages to be earned in the future. At defendant's request the court gave the following instruction:

> If you find in favor of plaintiff and decide to make an award for any loss of earnings in the future, you must take into account the fact that the money awarded by you is being received all at one time instead of over a period of time extending into the future and that plaintiff will have the use of this money in a lump-sum. You must, therefore, determine the present value or present worth of the money which you award for such future loss.

Such an instruction is mandatory in a FELA case if requested by any party. *St. Louis Southwestern Ry. Co. v. Dickerson,* 470 U.S. 409, 411-12, 105 S.Ct. 1347, 1349 (1985). Defendant now argues the court erred in permitting plaintiff to recover as a part of his damages any amount for the loss of future wages because the jury was not given any advice regarding the manner of computing the present value of future losses. First of all, defendant implies it was error to give the present value instruction

because it had no evidentiary support. However, the instruction was given by the court at the request of the defendant. A party may not be heard to complain on appeal about an instruction offered by the complaining party. *Bonnot v. City of Jefferson City*, 791 S.W.2d 766, 771 (Mo. App. 1990).

Of more substance is defendant's argument that, since a present value instruction is required in FELA cases, evidence of the manner of computing present value is an essential element of an FELA plaintiff's burden of proof. Defendant relies upon two decisions of the United States Court of Appeals, 3rd Circuit, which so hold . *DiSabatino v. National Railroad Passenger Corp.*, 724 F.2d 394, 396 (3rd Cir. 1984); *Ballantine v. Central Railroad of New Jersey*, 460 F.2d 540, 544 (3rd Cir.), *cert. denied*, 409 U.S. 879 (1972) . Defendant acknowledges the 8th Circuit has reached a contrary conclusion. *Duncan v. St. Louis-San Francisco R.R. Co.*, 480 F.2d 79, 87 (8th Cir.), *cert. denied*, 414 U.S. 859 (1972) .

While no Missouri case has specifically addressed the point, Missouri appears to follow the rule laid down by the 8th Circuit. In *Bair v. St. Louis-San Francisco Ry. Co.*, 647 S .W. 2d 507 (Mo. banc), *cert. denied*, 464 U.S. 830 (1983), this Court stated, "The fact that a dollar today is not the same thing as a dollar payable some years from now, furthermore, is the matter of plainest fact which could be appropriately argued without the need for expert testimony." 647 S.W. 2d at 513. *See also Nesselrode v. Executive Beechcraft, Inc.*, 707 S.W.2d 371, 387 (Mo. banc 1986).

Defendant discounts the authoritative nature of *Bair*, arguing that it has been rendered obsolete by reason of the *Dickerson* mandate to instruct on present value. While *Dickerson* required the instruction noted above, it also stated, "[N]o single method for determining present value is mandated by federal law." 470 U.S. at 412, 105 S.Ct. at 1349. Therefore, we do not run afoul of the federal law by following *Bair* and holding that either plaintiff

or defendant may offer present value evidence, but whether or not such evidence is offered, the subject is open to jury instruction if requested and to jury argument. We reject defendant's argument that the verdict of the jury reflects a "total failure to reduce the future damages to future value." The jury returned a general verdict, as is required under Missouri procedure. *Rule 71.02*. The sum included within the general verdict as compensation for future loss of wages is a matter forever relegated to the bosom of the jury. In the absence of any contrary indication, we can assume each juror in his or her respective fashion complied with the instruction and determined the present value of future wage loss.

V.

Plaintiff's cross-appeal challenges the trial court's order amending the judgment by granting defendant a set-off in the sum of $8,134.61 in recognition of money paid by Union Pacific Railroad (UPR) for medical treatment and $81,625.57 representing payments made to plaintiff by Union Pacific Corporation (UPC) pursuant to a salary continuation and long-term disability plan. The court further ordered that defendant be given credit for any disability payments made between the time of judgment and the date the judgment is satisfied.

Plaintiff argues that defendant Missouri Pacific Railroad (MPR) is not entitled to a set-off under the provisions of 45 U.S.C. § 55 (1988) because it did not make the payments, because the payments were not made in order to reduce its liability under the FELA, and because the plans pursuant to which the disability payments were made do not provide for recoupment of sums paid prior to judgment in the FELA action.

45 U.S.C. § 55 (1988) provides, in pertinent part, as follows:

> [I]n any action brought against any such common carrier under or by virtue of any of the provisions of this chapter,

> such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

Plaintiff concedes that if the payments at issue were made by MPR the statute would apply and MPR would be entitled to the set-off. However, because the payments were made by UPR and UPC, plaintiff argues the statute has no application and the collateral source rule prohibits the giving of credit to the defendant for payments made by others.

At the heart of this dispute is the corporate structure in which the three corporations exist. As we understand the situation, UPC is a holding company which, through various wholly owned subsidiary corporations, is the ultimate owner of 100 percent of the stock of UPR and MPR. Although there has been considerable merging and consolidation of the operations of the various corporations, they have each maintained a distinct corporate status and identity. Plaintiff relies upon *Boswell v. May Centers, Inc.*, 669 S.W.2d 585 (Mo. App. 1984), in which a subsidiary corporation sought immunity from its negligent infliction of injury upon an employee of its parent corporation under the exclusive remedy provisions of the workers' compensation law § 287.120.1, RSMo 1986. In denying the subsidiary corporation such immunity, the court stated:

> It is totally incongruous and patently unjust to permit the parent to hide behind the shield of separate corporate identity when advantageous, but to disallow such separateness when it is not. Strangers may be permitted to show commonality of control and identity, but the corporation may not "pierce its own corporate veil" — a veil it has deliberately established.

Boswell, 669 S.W.2d at 586.

Although we find no fault in the principles enunciated there, *Boswell* is not dispositive of the issue here presented. In *Boswell*, the subsidiary corporation did not fit within the statutory definition of an "employer", § 287.030.1(1), RSMo 1986, and therefore did not have standing to assert the exclusive remedy defense. That the payments in this case were made by related but nevertheless distinct corporations is not a crucial issue in determining the applicability of 45 U.S.C. § 55. In distinguishing between payments under the statute and collateral source payments, the federal courts have said "[t]he important consideration is the character of the benefits received, rather than whether the source is actually independent of the employer." *Clark v. Burlington Northern, Inc.*, 726 F.2d 448, 450 (8th Cir. 1984). Thus, in *Folkestad v. Burlington Northern, Inc.*, 813 F. 2d 1377 (9th Cir. 1987), payments made through an insurance company under a plan financed by various railroads were held subject to the statutory setoffs. In both *Clark* and *Folkestad* particular note was paid to the fact that, although the plans provided for payment on account of both work related and non-work related injuries, the plans also provided for reduction of the employee's recovery under FELA to the extent of payments received. Permitting this setoff "was appropriate because of the intent of the Congress to permit the employer to avoid double liability. " *Folkestad*, 813 F.2d at 1383. As noted in *Clark*, 726 F.2d at 451, "the employer's manifest intent to avoid double liability in offering disability plans must be respected if the collateral source rule is not to swallow up 45 U.S.C. § 55 at the ultimate expense of employees."

The plans under which the payments were made in this case provide they are made on behalf of "affiliate" companies, which include MPR. The plans also provide that payments made shall be reduced by any amounts payable by any workers' compensation, *employer's liability* or similar law. We think it obvious the purpose of the plans, covering employees of all the related railroads was to avoid double liability. This purpose, in accord with congressional intent, is the crucial issue. It is to the benefit

of the injured employee that he receive payment for medical care and disability income without the inevitable delay attendant to the conclusion of litigation in which these medical expenses and lost wages are a part of his recovery. The railroad should not be punished nor should the employee receive a windfall for which he has contributed nothing, by allowing the employee a double recovery.

We also note that, although the payments under the plans were not made by checks drawn against any MPR account, the payroll of MPR and other subsidiary railroads are also paid by UPR. Charges against the various companies, including charges for the cost of the plans, is a matter of internal bookkeeping procedures within the overall corporate structure.

Accordingly, plaintiff's appeal is denied.

The judgment of the trial court in all respects is affirmed.

JOHN C. HOLSTEIN, Judge

Robertson, C.J., Covington, Benton, Price, JJ.,
Crow and Conley, Sp.JJ., concur.
Thomas, J., not participating.

APPENDIX B

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

Cause No. 872-01007
Division No. 7

LAWRENCE J. ANGLIM,
Plaintiff,

vs.

MISSOURI PACIFIC RAILROAD COMPANY,
Defendant.

[Filed October 12, 1989]

AMENDED JUDGMENT

Defendant's Motion To Amend the Judgment previously argued and taken as submitted is sustained and the judgment is amended as follows:

> The previous judgment if $2,300,000.00 is hereby reduced in the amount of $89,760.18 and an amended judgment of $2,210,239.82 is hereby entered as the judgment in this case.

It is further ordered that the Defendant be given credit against the judgment for any future payment to the Plaintiff under either the Salary Continuation Plan or the Long Term Disability Plan from the date of the judgment until the judgment is satisfied.

SO ORDERED:

/s/ James L. Sanders
James L. Sanders, Judge

cc: Mr. William D. Hamblin
Mr. Dan H. Ball
Mr. Paul C. Hetterman

APPENDIX C

CLERK OF THE SUPREME COURT
STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI 65102
TELEPHONE
(314) 751-4144
THOMAS F. SIMON
CLERK

July 21, 1992

Mr. Dan H. Ball
Mr. James W. Erwin
Suite 3400
One Mercantile Center
St. Louis, Missouri 63101

In re: Lawrence J. Anglim vs. Missouri Pacific Railroad Company
Supreme Court No. 74124

Dear Counsel:

Please be advised that the Court this day entered the following order in the above-entitled cause:

"Appellant's motion for rehearing overruled. Opinion modified on Court's own motion."
Thomas, J., not participating.

Very truly yours,

THOMAS F. SIMON

/s/ Mary Elizabeth McHaney
Mary Elizabeth McHaney
Deputy Clerk, Court en Banc

/csm

cc: Mr. Robert Ritter & Mr. Joe Walsh III
Mr. Paul Hetterman
Mr. John Bardgett
Mr. Steven Ringkamp
Mr. Albert Schoenbeck
Mr. John Crenshaw
Mr. Michael Quinlan
Mr. Michael Costello
Mr. Martin Zucker